Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-90

JAMES E. SKELTON,

Appellant

v.

CITY OF BIRMINGHAM,

Appellee

APPEAL FROM THE ALABAMA COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. .....

JAMES E. SKELTON,
Appellant

v.

CITY OF BIRMINGHAM,
Appellee

APPEAL FROM THE ALABAMA COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT

Pursuant to rules 13 (2) and 15 of the Rules of the Supreme Court of the United States, appellant, James E. Skelton, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Alabama Court of Criminal Appeals in this case and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals is officially reported at 368 So 2d 877 and is included herein as appendix A, infra, p. A-1.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a final judgment made and entered by the Alabama Court of Criminal Appeals affirming the conviction of appellant of the criminal offense of "trespass after warning" under Section 54-1 of the General Code of the City of Birmingham, Alabama of 1964, as amended. The opinion of that court held that the Birmingham ordinance is constitutionally valid and is not overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution and is not vague and indefinite in violation of the Fourteenth Amendment to the United States Constitution.

The judgment of the Alabama Court of Criminal Appeals (appendix B, infra, p. A-6) was entered on January 16, 1979. An order by that Court overruling an application for rehearing (appendix B, infra, p. A-6) was entered on February 20, 1979. The order of the Supreme Court of Alabama, (appendix C, infra, p. A-8) denying appellant's petition for writ of certiorari to the Alabama Court of Criminal Appeals was entered on April 6, 1979, without opinion. A notice of appeal, (appendix D, infra, p. A-9) was filed on June 25, 1979, in the Alabama Court of Criminal Appeals. On June 28, 1979, an order was entered by this Court granting appellant an extension of time for docketing this appeal to and including July 26, 1979. (appendix E, infra, p. A-10)

The jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1257 (2). The cases that sustain the jurisdiction of this court include:

Cantwell v. Connecticut
310 US 296, 84 L Ed 1213, 60 S Ct 900 (1940)

Coates v. Cincinnati
402 US 611, 29 L Ed 2d 214, 91 S Ct 1686 (1971)
Cox v. Louisiana
379 US 536, 13 L Ed 2d 471, 85 S Ct 453 (1965)
Jamison v. Texas
318 US 413, 87 L Ed 869, 63 S Ct 669 (1943)
Lovell v. Griffin
303 US 444, 82 L Ed 949, 58 S Ct 666 (1938)
Stromberg v. California
283 US 359, 75 L Ed 1117, 51 S Ct 532

ORDINANCE INVOLVED

Section 54-1 (a) of the General Code of the City of Birmingham, Alabama of 1964, as amended, page 690, provides as follows:

TRESPASS

Section 54-1. After warning.

(a) It shall be unlawful for any person to go upon or remain upon the lands, buildings, or premises of another or any part, portion or area thereof after having been forbidden to do so or warned not to do so, either orally or in writing, by the owner, lessee, custodian or other person in possession thereof, his agent or representative, or having been forbidden to do so or warned not to do so by a sign posted on such land, building, premises or part, portion or area thereof at a place where such sign may be reasonably seen; provided that this section shall not apply to police officers in the discharge of official duties.

The foregoing ordinance shall herein be referred to by appellant as "Birmingham ordinance."

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

1. Whether the Alabama Court of Criminal Appeals properly found that the Birmingham ordinance was not unconstitutionally overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution and other individual liberties and freedoms protected by the United States Constitution.

2. Whether the Alabama Court of Criminal Appeals properly found that the Birmingham ordinance was not unconstitutionally vague and indefinite in violation of the Fourteenth Amendment to the United States Constitution.

3. Whether Appellant's conviction was unconstitutionally based on a record lacking any relevant evidence as to any crucial element of the offense for which he was charged in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On November 8, 1977, appellant was arrested for a violation of the Birmingham ordinance by a police officer of

the City of Birmingham, Alabama and was thereafter tried and convicted in the Recorder's Court of the City of Birmingham for a violation of that ordinance. From that conviction Appellant perfected and took an appeal to the Circuit Court of the Tenth Judicial Circuit of Alabama with an expressed waiver of his right to a trial by jury. On the trial date of June 23, 1978, the City of Birmingham filed a complaint against appellant charging him with a violation of the Birmingham ordinance. Appellant filed a written demurrer to the complaint which was overruled. Thereafter upon trial de novo in the Circuit Court before a Judge without a jury and without Appellant presenting any evidence, appellant was convicted. From that conviction appellant took an appeal to the Alabama Court of Criminal Appeals which rendered an opinion affirming the judgment of the Circuit Court.

The facts involved are as follows:

On November 8, 1977, appellant was present in a building located in the City of Birmingham, Alabama, in which various banking transactions were taking place. He entered that building for the purpose of negotiating government checks. While in the building, appellant yelled out "I don't like for a goddamn nigger to be staring at me." The comment was directed to a black security guard in the employment of Birmingham Trust National Bank (hereinafter referred to as B.T.N.B.). Appellant repeated the statement two more times after being warned to watch his language by two other B.T.N.B. security guards. After the second warning, appellant was allowed to cash his check and was then escorted from the building by B.T.N.B. security guards to await the arrival of a Birmingham police officer.

While outside the building, and while appellant was seated in a Birmingham police car which was parked on a public street, a vice-president of B.T.N.B. stated to appel-

lant in the presence of Officer Jan Snider of the Birmingham Police Department as follows:

> ". . . I did not appreciate the abusive language that he had used in the presence of my employees and my customers and that I was closing his account so he would not have any reason for ever coming back into the bank and I did not want him to come back in the bank."

No other statement was made to appellant by an agent or representative of B.T.N.B. after this statement was made by the vice-president.

After the vice-president's statement, appellant left the police car and walked in the first door and the second door of a building and was then arrested by Officer Snider for a violation of the Birmingham ordinance. Officer Snider did not know who owned or possessed the premises upon which appellant entered and there was no evidence introduced that appellant did not have any ownership or possessory interest in the property upon which he entered after the foregoing statement of the vice-president.

The Federal questions concerning the unconstitutional overbreath and vagueness of the Birmingham ordinance were raised first in the Circuit Court by a written demurrer to the complaint specifying those constitutional grounds in support thereof (Appeal Record, p. 81). The demurrer was overruled by the Circuit Court (Appeal Record, p. 83). These same constitutional issues were thereafter raised on appeal to the Alabama Court of Criminal Appeals in the section designated in appellant's brief as "Statement of Issues Presented" in furtherance of Rule 20 of the Alabama Rules of Appellate Procedure. Said rule reads as follows:

> "Assignment of errors are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient."

The Alabama Court of Criminal Appeals in its decision (Appendix A, p. A-1) considered and passed upon the

merits of each of these constitutional issues and found that the Birmingham ordinance was not unconstitutionally overbroad on its face in violation of the First and Fourteenth Amendments of the United States Constitution and not vague and indefinite in violation of the Fourteenth Amendment of the United States Constitution. Appellant's application for a rehearing of that decision on these issues, inter alia, was thereafter overruled (Appendix B, p. A-6). A petition for Writ of Certiorari was filed with the Alabama Supreme Court to review the decision of the Alabama Court of Criminal Appeals respecting each of these constitutional issues. The Alabama Supreme Court denied the petition for the Writ, without opinion, on April 6, 1979. (See Appendix C, p. A-8).

The Federal questions arising out of the unconstitutional conviction of Appellant on a record lacking any evidence was initially raised on appeal to the Alabama Court of Criminal Appeals in the heretofore mentioned section of appellant's brief designated as "Statement of Issues Presented." The Alabama Court of Criminal Appeals in its decision never specifically directed its opinion to that constitutional issue although they did hold that the sufficiency of the evidence was not before that Court for review since it was not raised in the Circuit Court prior to the appeal. The Alabama Court of Criminal Appeals, although refusing to consider the sufficiency of the evidence as that issue is distinguished from the constitutional issue of a conviction upon no evidence, considered and determined that the evidence was sufficient with respect to the "possession of the premises" element of the offense. Thereafter appellant's petition to the Alabama Supreme Court for Writ of Certiorari to review the decision of the Alabama Court of Criminal Appeals on this constitutional issue was denied on the aforementioned date.

SUBSTANTIALITY OF FEDERAL QUESTIONS

1. Federal Questions involving overbreath and vagueness of the Birmingham ordinance are substantial

The substantial character of the Federal questions involving the overbreath and vagueness of the Birmingham ordinance is apparent from the Birmingham ordinance's unlimited susceptibility to regulating the exercise of all First Amendment freedoms and all other constitutionally protected freedoms on public property; the Birmingham ordinance's delegation of limitless discretionary power to "agents and representatives" of the City of Birmingham in applying its sanctions; and the unconstitutional ineptness of the Birmingham ordinance in warning those who are subject to its provisions of the boundary between constitutionally permissible and constitutionally impermissible applications of the ordinance. The compelling need for a resolution of the Federal questions involved herein becomes blaring when the ordinance, with such unconstitutional infirmities, is viewed in light of the deterrent and adverse effect it has upon the freedom of movement throughout the City of Birmingham of all persons on its highways, streets, sidewalks and other public property.

The Birmingham ordinance's susceptibility of regulating every constitutionally protected individual freedom which may be exercised on public property, is inexhaustible. The object of its regulation is conduct on all real property in the City of Birmingham which includes property privately owned and property dedicated for public use, i.e., public property. It is the ordinance's unlimited and undefined regulation of conduct on all public property which creates the cancerous unconstitutional character of the ordinance.

Under the ordinance *any* person acting in the capacity of "agent or representative" of the City of Birmingham has

the unrestricted power to totally prohibit *any* use of *any* public property in the City of Birmingham by giving the requisite warning to a person on or about to enter such property. With such power an agent or representative can regulate the manner, character and extent of that use and thereby regulate every conceivable form of an individual's exercise of his First Amendment freedoms on public property. The exercise of the First Amendment freedoms can be totally suppressed by arrest under the ordinance or can be regulated or molded by the threat of the imposition of the ordinance's sanctions. Further, the control and regulation of the exercise of these First Amendment freedoms is conferred upon the City's agents or representatives without any attempt to limit or restrict their exercise of that power thereby making the peaceful enjoyment of these freedoms contingent upon the uncontrolled will of city officials. Such absolute and unrestricted discretion granted to the numerous agents or representatives of the City of Birmingham allows these agents to inflict the sanctions of the ordinance at their capricious whim on any person who refuses to abide by an agent's directive as to the manner or use of public property.

The ordinance is not only susceptible of invading every conceivable exercise of the First Amendment freedoms, as shown, but stretches its unconstitutional infringement to all other constitutionally protected rights that may be exercised on public property; one of such rights being the right to travel which is protected under the liberty provision of the "due process clause". With such unlimited discretionary power provided by the ordinance, an agent or representative of the City can totally or partially restrict any person's use of public property for travel thereby resulting in far-reaching and adverse effects on the freedom of movement of persons in intrastate or interstate travel through Birmingham. The well-founded apprehension of such per-

sons of being subjected to punishment under the Birmingham ordinance creates an intolerable burden on this constitutionally protected right and on other interstate activities.

The ordinance suffers from the unconstitutional vice of vagueness which is blatantly apparent from the fact that those agents or representatives who are to apply the ordinance, with such an uncontrollable grant of unlimited discretionary power bestowed upon them, must necessarily guess at its meaning and differ as to when and under what circumstances it is to be applied. *A fortiori*, those who would be subject to its sanctions have no means available to determine what conduct on their part would render them liable to its penalties.

It is the intolerable stranglehold which the web of the Birmingham ordinance has on the exercise of the constitutionally protected individual freedoms and the well-founded fear of impending punishment generated by such a vague and indefinite ordinance which would subject any conduct on public property to criminal sanctions at the whim of any city official, that makes the Federal questions raised herein so substantial as to command a consideration by this court.

The requisite substantiality of the Federal questions raised herein is firmly supported by the earlier decisions rendered by this court on appeal, which are listed at p. 2, supra, as authority to sustaining the jurisdiction of this court. The decision in each case involved a finding by this court that the statutes or ordinances involved therein were unconstitutionally overbroad or vague on their face or both in violation of the First and Fourteenth Amendments of the United States Constitution. In each case this court considered the same constitutional questions raised on this appeal involving statutes or ordinances of the same unconstitutional character as the Birmingham ordinance. The fact that the constitutional questions raised in each of these

cases were considered and responded to by this Court is abiding precedent that the constitutional questions involved herein are so substantial that this court should require plenary consideration of this appeal.

The *Coates v. Cincinnati*, 402 US 611, 29 L Ed 2d 214, 91 S Ct 1681; *Cox v. Louisiana*, 379 US 536, 13 L Ed 2d 487, 85 S Ct 476; and the *Cantwell v. Connecticut* 310 US 296, 84 L Ed 1213, 58 S Ct 900, cases are noteworthy.

The *Cox* case involved "breach of the peace" and an "obstructing public passages" statutes of Louisiana whose only dissimilarity to the Birmingham ordinance were that they did not have the optimum overbreath character as the Birmingham ordinance. There, this court, after considering the same constitutional questions raised herein, found the breach of the peace statute to be "unconstitutionally vague in its overly broad scope" 13 L Ed 2d, 471, 482, and the "Obstructing public passages" statute was considered to vest unfettered discretion in local officials in applying the statute in violation of the rights granted under the First Amendment of the United States Constitution, 13 L Ed 2d 471.

The *Coates* case involved a regulatory statute more narrowly drawn than the Birmingham ordinance. The substantially of the Federal questions of facial overbreath and vagueness raised therein was confirmed by this court; the same being evidenced by this court's decision invalidating that statute on its face as being unconstitutionally vague in that it subjected the exercise of the right of assembly to unascertainable standards and was unconstitutionally overbroad because it authorized the punishment of constitutionally protected conduct.

The *Cantwell* case came to this court on appeal and involved a decision by this court that the unlimited discretionary power granted to a public official under a Connecticut

statute (which was the same power as is granted under the Birmingham ordinance) rendered that statute unconstitutionally overbroad as a denial of the First Amendment freedoms.

On at least three occasions in cases on review to this Court by petition for writ of certiorari, this Court has considered the same constitutional questions of overbreath and vagueness as raised herein resulting in the facial invalidation by this court of ordinances or statutes which were similar to the same general regulatory scheme as the Birmingham ordinance. In each case, the substantiality of the Federal questions involved was unquestionably apparent.

Shuttlesworth v. Birmingham
382 US 87, 15 L Ed 2d 176, 86 S Ct 211
Shuttlesworth v. Birmingham
394 US 147, 22 L Ed 2d 162, 89 S Ct 935
Edwards v. South Carolina
372 US 299, 9 L Ed 2d 697, 83 S Ct 680

Noteworthy among these cases is *Shuttlesworth v. Birmingham,* 15 L Ed 2d 176, which involved another Birmingham ordinance which made unlawful any person who stands or loiters on any street or sidewalk after having been requested by a police officer to move. After declaring that Birmingham ordinance unconstitutionally void on its face, this court made the following declaration concerning that ordinance which is applicable to the Birmingham ordinance involved in this appeal, whereby this Court said that "the constitutional vice of so broad a provision needs no demonstration." 15 L Ed 2d 176, 179.

At least two cases involving similar constitutional questions and general regulation laws have reached this Court by direct appeal and have resulted in this Court invalidating the statutes involved therein on the same constitutional basis asserted herein by appellant.

Aptheker v. Secretary of State
378 US 500, 12 L Ed 2d 992, 84 S Ct 1659.
Keyishian v. Board of Regents of the University of New York
385 US 587, 17 L Ed 2d 629, 87 S Ct 675

2. Federal Question involving unconstitutional conviction based on no evidence is substantial.

The constitutional question involving the appellant's assertion that his conviction was based on the complete absence of the introduction of any evidence as to one or more of the crucial elements of the offense for which he was charged, is a constitutional question of a substantial character.

It is clear from the decisions of this Court that such a conviction based on a record lacking any relevant evidence of Appellant's guilt has been firmly established as a violation of the "due process clause" of the Fourteenth Amendment to the United States Constitution.

Thompson v. City of Louisville
362 US 199, 4 L Ed 2d 654, 80 S Ct 624
Vachon v. New Hampshire
414 US 478, 38 L Ed 2d 666, 94 S Ct 664

The substantiality of this constitutional question is founded upon this court's determination that such a claim has serious constitutional overtones, *Thompson v. Louisville,* supra, when applied to the facts involved in this case.

The record in this case is devoid of any evidence of the crucial element of the warning requirement under the Birmingham ordinance and of any evidence that appellant went upon and remained upon the premises of "another" after an alleged warning had been given to him.

With respect to the warning requirement, the vice-president's statement, infra p. 5 was not a warning to appellant, but merely an assertion of that vice-president's personal

preference that he did not want appellant in the bank. There was no warning or statement forbidding appellant not to enter.

The record is also devoid of any evidence that the property entered by appellant was that of "another" as required by the ordinance. In the complaint, appellant was charged with entry upon the premises of B.T.N.B. There is no evidence in the record that the premises which appellant entered after the vice-president's statement was that of B.T.N.B.'s. Further, there was no evidence in the record showing that appellant did not have any ownership or possessory right to the premises upon which he entered after the statement; such proof being required by the ordinance's use of the term "another" which refers to possession of premises by someone other than appellant.

Wherefore, the Federal question concerning the unconstitutional conviction of appellant without any evidence to support that conviction has such serious constitutional overtones as would create a substantial Federal question for this court's consideration on this appeal.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before this court substantial and important Federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated: July 9, 1979

WINSTON B. MCCALL, JR.
1028 Woodward Building
Birmingham, Alabama 35203
205/322-8484
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have on this 17th day of July, 1979, served a copy of the above and foregoing Jurisdictional Statement on counsel of record of all parties to this appeal by mailing the same by United States Mail, First Class, postage prepaid, addressed as follows:

Ms. Rowena Crocker
Assistant City Attorney
City of Birmingham — Legal Department
Birmingham City Hall
Birmingham, Alabama 35203

Attorney

APPENDIX

APPENDIX A

OPINION OF THE ALABAMA COURT OF CRIMINAL APPEALS

January 16, 1979

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

6 Div. 878

James E. Skelton
v
City of Birmingham
Appeal from Jefferson Circuit Court

BOOKOUT, JUDGE

Criminal trespass after warning; sentence: $300 fine plus costs.

On November 8, 1977, appellant was in the downtown office of Birmingham Trust National Bank (hereinafter BTNB) for the purpose of negotiating government checks. While in BTNB (in the presence of BTNB customers and employees), appellant yelled out: "I don't like for a God-damned nigger to be staring at me." The comment was directed to Mr. Reaf Blue, a black BTNB security guard. Appellant repeated the statement two more times after being warned to watch his language by two BTNB security guards, Mr. Leonard Stanley and Mr. Joseph Davis. After the second warning, appellant was allowed to complete his banking business and was then escorted from the bank by BTNB security guards to await the arrival of a Birmingham police officer.

Rufus Allen, a senior vice president of BTNB, stated to appellant in the presence of Officer Jan Snider of the Birmingham Police Department:

> "... I did not appreciate the abusive language that he had used in the presence of my employees and my customers and that I was closing his account so he would not have any reason for ever coming back in the bank and I didn't want him to come back in the bank."

Officer Snider then asked appellant if he understood the warning and repeated it to appellant. Officer Snider told appellant that he could go free but not to go back into the bank; that if he did go back into the bank, he would be arrested for trespass after warning. Appellant stated that he would "have to call your bluff," went back into the bank, and was arrested for trespass after warning. Appellant was tried without a jury.

I

Appellant contends that the Birmingham ordinance under which he was prosecuted is unconstitutionally overbroad and vague on its face in violation of the First and Fourteenth Amendments to the United States Constitution. The pertinent provisions of § 54-1, Birmingham City Code 1964, as amended, are as follows:

> "(a) It shall be unlawful for any person to go upon or remain upon the lands, buildings, or premises of another or any part, portion or area thereof after having been forbidden to do so or warned not to do so, either orally or in writing, by the owner, lessee, custodian or other person in possession thereof, his agent or representative..."

A

Overbreadth

Appellant contends that the Birmingham ordinance is so overbroad and all embracing as to place first amendment freedoms in jeopardy. Appellant was arrested for trespass after warning as a direct result of an alleged disturbance caused by means of speech. He argues that the exercise of free speech on public property is a constitutionally protected right.

First, BTNB is private property and not public property. This court takes judicial note that national banks are corporations organized and existing under the laws of the United States. *Adler v. First National Bank of Birmingham*, 233 Ala. 325, 171 So. 904 (1937). Property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). See also: *Curtis v. Rosso & Mastracco, Inc.*, 413 F. Supp. 804 (1976). Secondly, as stated in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971):

> "...[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses..."

BTNB, through its agent, vice president Allen, had a legitimate right to order anyone from its premises in order to avoid a disturbance. *Johnson v. State*, 277 Ala. 655, 173 So.2d 824 (1964). "If one is granted the liberty to invade another's private property over the objection of the owner for any period of time, that same liberty would continue for all time, and the result is destruction of property without due process in direct violation of the Constitution."

Clark v. State, 219 Ga. 680, 135 S.E.2d 270 (1964). We hold that the Birmingham ordinance is not so broad that its sanctions apply to conduct protected by the Constitution.

B

Vagueness

Appellant's contention that the Birmingham trespass ordinance is unconstitutionally vague and in violation of the Fourteenth Amendment to the United States Constitution has no merit. This question was answered in *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So.2d 456 (1965) and *Thomas v. City of Birmingham*, 42 Ala.App. 542, 171 So.2d 84, cert. denied, 277 Ala. 702, 171 So.2d 85 (1964). The language of the ordinance is clear and precise. It states exactly what conduct is unlawful and provides for a warning to be given. A person of common intelligence would not have to guess at the meaning of the ordinance. *Kahalley v. State*, 254 Ala. 482, 48 So.2d 794 (1950).

II

Appellant's next contention is that the City failed to prove that the premises upon which he entered were in possession of BTNB as alleged in the complaint.

"Possession is a collective fact to which a witness may testify." *Lawson v. Garrett*, 286 Ala. 125, 237 So.2d 648 (1970). Mr. Leonard Stanley testified that he was employed by BTNB as a guard supervisor, his salary was paid by BTNB, and he had worked at the downtown office for seventeen years. Mr. Reaf Blue testified that he was a security guard for BTNB and had worked at the downtown office for six and one-half years. Mr. R. C. Allen testified that he was a senior vice-president of BTNB and had worked at the downtown office for forty years. Mr. Allen testified

that BTNB had occupied the downtown location since October 26, 1923. Mr. Joseph Davis testified that he had been employed by BTNB as a security guard at the downtown office for twenty-six years. Officer Snider of the Birmingham Police Department testified that he arrested appellant inside the downtown office of BTNB. The testimony was more than adequate to establish that BTNB had possession of the property upon which appellant entered.

III

The appellant's next contention is that he was not tried by an impartial tribunal and, therefore, was denied due process of law under the Fourteenth Amendment to the United States Constitution. This issue has been raised for the first time on appeal. "An issue which is raised for the first time on appeal is raised too late for review." *Law v. State*, Ala.Cr.App., 342 So.2d 412, cert. denied, Ala., 342 So.2d 413, cert. denied, 434 U.S. 919 (1977).

IV

Appellant's last contention is that the evidence was insufficient to support the conviction. The appellant made a motion to exclude the evidence at the conclusion of the City's case. No grounds were stated. A motion to exclude without stating grounds is properly overruled. *Espey v. State*, 270 Ala. 669, 120 So.2d 904 (1960). In addition the appellant did not request the affirmative charge nor did he request a motion for new trial. *Youngblood v. State*, Ala.Cr.App., 338 So.2d 526 (1976).

AFFIRMED.

All the Judges concur.

APPENDIX B

JUDGEMENTS AND ORDERS OF THE ALABAMA COURT OF CRIMINAL APPEALS

James E. Skelton v. City of Birmingham, 6 Div. 878,
Jefferson Circuit Court
No. CC 78 00029

July 10, 1978.
Notice of Appeal
June 23, 1978.
Trial Court Notice
August 14, 1978.
Record Filed
August 11, 1978
Clerk's Certificate of Completion Date
November 8, 1978.

Come the parties by attorneys, and argue and submit this cause for decision.

January 16, 1979.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

January 30, 1979.

Comes now the Appellant in the above-styled cause and makes application in this Court for a rehearing of the decision rendered by this Court on January 16, 1979.

February 20, 1979.

It is ordered that the application for rehearing be and the same is overruled.

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing docket entries including the judgment entry, application for rehearing and order overruling same, are full, true, and correct copies as they appear and remain of record and on file in the Court of Criminal Appeals of Alabama.

I further certify that notice of denial of petition for writ of certiorari was received from the Supreme Court of Alabama on April 6, 1979, that certificates of judgment issued on that date and thereafter on April 27, 1979, on motion of appellant the judgment was stayed for a period of ninety (90) days to allow for filing of petition for writ of certiorari in the United States Supreme Court and that the certificate of judgment of the Court of Criminal Appeals of Alabama was recalled.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 14th day of June, 1979.

/s/ MOLLIE JORDAN

Clerk of the Court of Criminal Appeals of Alabama

APPENDIX C

ORDER TO ALABAMA SUPREME COURT
DENYING PETITION FOR WRIT OF CERTIORARI

APRIL 6, 1979

THE STATE OF ALABAMA – JUDICIAL
DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

78-341
Ex Parte: James E. Skelton
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(Re: James E. Skelton vs. City of Birmingham)

ORDER

The Petition for Writ of Certiorari to the Court of Criminal Appeals being duly submitted to this Court, IT IS CONSIDERED AND ORDERED that the petition be denied, at the costs of the petitioner, for which costs let execution issue.

TORBERT, C. J., MADDOX, JONES, SHORES AND BEATTY, JJ., CONCUR.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as same appears of record in said Court.
This the 13th day of June, 1979.

/s/ J. O. SENTELL

J. O. Sentell
Clerk, Supreme Court of Alabama

FILED
JUN 25 1979
Ala. Court Criminal Appeals
Mollie Jordan, Clerk

APPENDIX D

NOTICE OF APPEAL

IN THE
ALABAMA COURT OF CRIMINAL APPEALS

JAMES E. SKELTON, Appellant	)	
vs.	)	6 Div 878
CITY OF BIRMINGHAM, Appellee	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that James E. Skelton, the appellant abovenamed, hereby appeals to the Supreme Court of the United States from the final judgment of the Alabama Court of Criminal Appeals affirming the judgment of the Circuit Court of the Tenth Judicial Circuit of Alabama entered in this action on January 16, 1979.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

DATED June 22, 1979.

/s/ WINSTON B. MCCALL, JR.

Winston B. McCall, Jr.
1028 Woodward Building
Birmingham, Alabama 35203
205/322-8484
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of June, 1979, served a copy of the above and foregoing Notice of Appeal on counsel of record of all parties to the appeal by mailing the same by United States Mail, first class, postage prepaid, addressed as follows:

Ms. Rowena Crocker
Assistant City Attorney
City of Birmingham – Legal Department
Birmingham City Hall
Birmingham, Alabama 35203

/s/ WINSTON B. MCCALL, JR.
Attorney

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-1125

JAMES E. SKELTON,
Appellant,

v.

CITY OF BIRMINGHAM

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including July 26, 1979.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 28th
day of June, 1979

FILED
AUG 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-90

JAMES E. SKELTON,
Appellant,

v.

CITY OF BIRMINGHAM,
Appellee.

Appeal from the Alabama Court of Criminal Appeals

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-90

JAMES E. SKELTON,
Appellant,

v.

CITY OF BIRMINGHAM,
Appellee.

Appeal from the Alabama Court of Criminal Appeals

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Appellee moves the Court to dismiss the Appeal herein or, in the alternative, to affirm the judgment of the Alabama Court of Criminal Appeals on the ground that the Appeal presents no substantial federal question.

OPINION OF THE COURT BELOW

The opinion of the Alabama Court of Appeals is reported at 368 So.2d 877, and is set forth in the appendix to appellant's brief at appendix page A-1.

MOTION TO DISMISS OR AFFIRM

This Case Presents No Substantial Federal Question Warranting Review by This Court

Appellant has not been denied due process of law by his conviction for violation of the Birmingham trespass ordinance. The Alabama Court of Criminal Appeals properly followed the ruling of the Alabama Supreme Court in the case of *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So.2d 456 (1965) that the Birmingham trespass ordinance was valid on its face. The ordinance did not reach into constitutionally protected areas of freedom of expression and gave fair warning to all of the conduct prohibited by the ordinance. The Alabama Court of Criminal Appeals properly affirmed the trial court's findings as to the weight and sufficiency of the evidence presented to support the conviction. There is clearly no substantial federal question raised for review.

QUESTIONS PRESENTED

Appellant in his Statement before this Court has raised for the first time the issue that the Birmingham trespass ordinance is unconstitutionally overbroad in that it purports to sanction "other individual liberties and freedoms protected by the United States Constitution." Appellee maintains that since this issue has never been raised before at any trial or appellate level that such issue is not now properly before this Court.

1. Whether the Alabama Court of Criminal Appeals properly found that the Birmingham ordinance was not unconstitutionally overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the Alabama Court of Criminal Appeals properly found that the Birmingham ordinance was not unconstitutionally vague and indefinite in violation of the Fourteenth Amendment to the United States Constitution.

3. Whether Appellant's conviction was unconstitutionally based on a record lacking evidence as to any crucial element of the offense for which he was charged in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT

On November 8, 1977, Appellant was in the downtown office of Birmingham Trust National Bank (hereinafter referred to as BTNB) for the purpose of negotiating government checks. While in BTNB, Appellant yelled out, "I don't like for a God-damned nigger to be starring at me!" This comment was directed to Reaf Blue, a black bank security guard employed by BTNB. Appellant was warned by two other BTNB guards to watch his language and to refrain from using profanity in the presence of bank employees and customers. After each warning, Appellant would again yell out this same statement. After the third outburst, BTNB security guards allowed Appellant to complete his banking business and escorted him from the bank. The Birmingham Police Department was notified and their assistance was requested.

Upon the arrival of Birmingham police officer, Jan Snider, Rufus Allen [a senior vice-president of BTNB] came outside and spoke with the Appellant in the presence of the officer. Mr. Allen told Appellant:

> ". . . I did not appreciate the abusive language that he had used in the presence of my employees and my customers and that I was closing his account so he would not

have any reason for ever coming back in the bank and I didn't want him to come back in the bank."

Officer Snider asked Appellant if he understood the warning given by Mr. Allen and repeated it to Appellant. Officer Snider told Appellant he was free to go, but not to go back into the bank; that if he did go back into the bank, he would be arrested for trespass after warning. Appellant replied that he would "have to call your bluff," and proceeded back into the bank. At this time Appellant was placed under arrest for trespass after warning.

Birmingham Trust National Bank is a national bank organized in 1887. It has occupied and operated a banking business in this downtown location since October 26, 1923.

ARGUMENT

1

Appellant Was Not Deprived of Due Process of Law Under the Fourteenth Amendment in His Trial and Conviction for Violation of the Birmingham Trespass Ordinance.

I

Overbreadth

Appellant maintains that the language of the Birmingham criminal trespass ordinance, when viewed on its face, is so broad in scope that it purports to sanction conduct protected under the Constitution, specifically First Amendment freedoms. It is not claimed that the ordinance has been unconstitutionally applied to Appellant in its enforcement. He asserts that enforcement of the ordinance, because of its alleged overbreadth, could infringe on the rights of free speech, press, assembly. . . . These rights are protected from invasion by the First Amendment; the Fourteenth Amendment extends the protection by applying the First Amendment to invasion of these freedoms by the State. However, the Fourteenth Amendment has never been thought to control purely private action. Neither is mere enforcement by the State of charges brought by a private concern "state action" under the Fourteenth Amendment. This Court in *Gober v. City of Birmingham*, 373 U.S. 250, 83 S.Ct. 1133 (1963) stated:

> ". . . the Court does not question the long-established rule that the 14th amendment reaches *only state action*. Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. And it does not suggest that such action, denying equal protection, may be found in the *mere enforcement* of trespass laws in relation to private business establishments from

which the management . . . has chosen to exclude persons . . ." 83 S.Ct. at 1133 (emphasis added)

The fact that a private concern has extended a general invitation to the public to patronize its business does not cause it to "lose its private character" and thus become subject to Fourteenth Amendment restrictions. *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 2229, 33 L.Ed.2d 131 (1972). "An individual's right to restrict the use of his property however unregenerate a particular exercise of that right may be thought, lies beyond the reach of the Fourteenth Amendment." *Gober v. City of Birmingham, supra*, 83 S.Ct. at 1135. *Lloyd Corp. Ltd. v. Tanner, supra*. To deny private businesses the right to nondiscriminatorily limit the use of their premises as they see fit would be to deprive them of property "without due process of law" for "public use without just compensation." U.S. Const. amends. V and XIV.

Appellant contends that because the trespass ordinance may at times be applied to unlawful entry on *public* lands, there would be sufficient "state action" to invoke the Fourteenth Amendment on *all* enforcement of the ordinance. In insuring protection of First Amendment freedoms it must be remembered that they are not in themselves a touchstone; "the Constitution is not unmindful of other important interests, such as public order . . ." *Niemotko v. State of Maryland*, 340 U.S. 268, 284, 71 S.Ct. 328, 333 (1951). This Court recognized that "legislatures, local authorities and the courts have for years grappled with the claims of the right to disseminate ideas in public places as against claims of an effective power in government to keep the peace and to protect other interests of a civilized community." *Id.* at 274, 275. This Court established a standard for weighing First Amendment freedoms against the need for public order in *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965).

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

First Amendment freedoms have been jealously guarded by the Courts, but those rights of expression are not absolute at all times, all places and all circumstances. The exercise of such freedoms is concommittant with the responsibility not to abuse that liberty. Ala. Const.Art 1 § 4; *Lloyd Corp. Ltd. v. Tanner, supra*; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Intemperate, intentional offensiveness and personally abusive epithets, as were expressed by Appellant, are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire, supra*, 315 U.S. at 571; *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

In balancing First Amendment freedoms against the need to preserve public order, there are different degrees of protection afforded the right of free expression. This depends upon the nature of a place, its primary use, the pattern of its activities and the compatibility of the manner of expression with the place. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). In areas such as public streets and parks, freedom of expression is highly protected from government interference; these are areas which "have immemorially been held in trust for the use of the public. . . . for the purposes of assembly, communicating thoughts between citizens and discussing public questions." *Grayned v. City of*

Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). In facilities such as libraries and schools, the government has the power to limit freedom of expression to maintain the order required to carry on the purpose of those institutions. *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); *Grayned v. City of Rockford, supra; United States v. Douglass*, 579 F.2d 545 (9th Cir. 1978). Public institutions which perform no speech related functions at all may regulate freedom of expression to exclude that which interferes with their functioning. *Adderly v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *United States v. Douglass, supra.*

This Court in *Adderly v. Florida, supra*, ruled on the challenge of overbreadth to a trespass statute similar to the Birmingham ordinance. The Court ruled that there is:

> "Nothing in the Constitution of the United States [to prevent] Florida from even-handed enforcement of its general trespass statute . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfulfily dedicated. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 87 S.Ct. at 247.

The Alabama Court of Appeals properly found that the Birmingham trespass ordinance was not so broad on its face that it would sanction conduct protected by the United States Constitution.

II

Vagueness

Appellant contends that the Birmingham trespass ordinance is unconstitutionally vague and in violation of the Fourteenth

Amendment to the United States Constitution. The accepted test for determining the required precision of statutory language imposing criminal liability is whether the language conveys a sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice that a person of ordinary intelligence would be given fair notice that such conduct is forbidden by Statute and to mark boundaries sufficiently distinct for judge and juries to fairly administer the law. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808 (1954); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); *Jordan v. DeGeorge*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926). In applying this test, difficulty in determining whether certain marginal offenses come within the meaning of the language does not automatically render a statute vague for indefiniteness. *Jordan v. DeGeorge, supra*; *Roth v. United States, supra*; *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594 (1962).

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. . . ." *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 92 S.Ct. 1953 (1971).

The test for vagueness does not require impossible or impractical standards of specificity; "there are limitations in the English language with respect to being both specific and manageably brief." *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 2913-4, 37 L.Ed.2d 830 (1973). Condemned to the use of words, which inevitably contain germs of uncertainty, there can be no mathematical precision in drawing statutes.

In applying the test of vagueness to a statute or in determining overbreadth, it must be remembered that a fundamental rule of statutory construction is that the Court, if fairly possible, must construe statutes as to avoid a danger of unconstitutionality. *United States v. National Dairy Products, supra; United States v. Harriss, supra.*

The constitutional challenge was raised in the case of *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So.2d 456 (1965), alleging that the Birmingham trespass ordinance was vague and overbroad in violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Alabama ruled that the Birmingham ordinance clearly specified the type of conduct made a criminal offense under its provisions and that the ordinance was not unconstitutionally vague and thus was not invalid.

A majority of states have enacted the same or similar trespass statutes. This legislative right has traditionally been considered a valid exercise of the State to preserve property rights. Tradition holds that "American law punishes persons who enter onto the property of another after having been warned to keep off." *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 865 (1943). This Court in the cases of *Adderly v. State of Florida, supra*, and *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964) held that the Florida and South Carolina trespass statutes were not void for vagueness on their face; the language of the statute was "admirably narrow and precise" 84 S.Ct. at 1701 and held "nothing to entrap or fool the unwary." 87 S.Ct. at 244.

The Alabama Court of Criminal Appeals properly ruled that the language of the Birmingham trespass ordinance was ". . . clear and precise. It states exactly what conduct is unlawful and provides for a warning to be given. A person of common intelligence would not have to guess at the meaning of the ordinance."

Appellant's Jurisdictional Statement, A-4. The Birmingham ordinance is not unconstitutionally vague or indefinite on its face.

2

All elements of the Birmingham trespass ordinance were presented in evidence and were sufficient to sustain the conviction

Appellant maintains that there was a complete absence of the introduction of evidence as to one or more of the elements of the offense for which he was charged. The elements of the offense of trespass after warning are as follows:

(1) to go upon the lands, buildings or premises of another;

(2) after having been warned not to do so; and

(3) by the owner, lessee, custodian or other person in possession thereof, his agent or representative.

There exists in the trial record substantial evidence of all three elements.

(1) Possession of the premises resided in Birmingham Trust National Bank and has since October 26, 1923 (R. 47). "Possession is a collective fact to which a witness may testify." *Lawson v. Garrett*, 286 Ala. 125, 237 So.2d 648 (1970). Each witness testified that the property was in the possession of BTNB and there was no testimony presented that possession resided in any other.

(2) Appellant would argue the semantics of the word "warning," alleging that no warning was given, only an expressed preference. In looking to the record, Mr. Allen, a senior vice-president of BTNB told Appellant that he would have no reason ever to come back in the bank and that he (Mr. Allen) did not want him to come back in the bank. (R.44) Following

this statement, Officer Snider, in the presence of Mr. Allen, told Appellant not to go back in the bank again. Officer Snider explained to Appellant that he had been warned to stay out and that if he did go back into the bank, he would be arrested for trespass after warning. (R. 70). Appellant replied to Officer Snider that he would "have to call your bluff." (R. 33, 45, 70). This statement by Appellant strongly implies that he recognized the warning and intentionally chose to disregard the warning.

(3) The third element is that the warning be given by the owner, lessee, custodian, possessor or the agent or representative thereof. Mr. Allen, a ranking officer of BTNB, was recognized to be the person in charge of this location of the bank. (R. 16, 40). By virtue of these positions, Mr. Allen was acting as agent or representative of BTNB, the possessor of the premises.

Each of the elements of the offense was supported by substantial, admissible, unrebutted evidence which was sufficient to prove the offense charged.

CONCLUSION

For the foregoing reason Appellee respectfully submits that the Birmingham trespass ordinance presents no question whatever in conflict with the First and Fourteenth Amendments to the Constitution of the United States, or the decisions of this Court. Accordingly, Appellee moves the Court to dismiss this Appeal or, in the alternative, to affirm the unanimous judgment entered in the cause by the Alabama Court of Criminal Appeals.

Respectfully submitted,

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